IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ANTONIO E. GLORIA, Petitioner Employee, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, BAJA PRODUCTS, Respondent Employer, EMPLOYERS INSURANCE COMPANY OF WAUSAU, Respondent Insurer.	2 CA-IC 2006-0013 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

SPECIAL ACTION - INDUSTRIAL COMMISSION

ICA Claim No. 20050970591

Insurer No. WC905400132

LuAnn Haley, Administrative Law Judge

AWARD AFFIRMED

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and

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B R A M M E R, Judge.

¶1 In this statutory special action, petitioner Antonio Gloria contends the administrative law judge (ALJ) erred in finding he had not sustained a compensable work-related injury. The ALJ determined Gloria "ha[d] not established a causal connection between his complaints and his work duties." Finding no error, we affirm the award.

Factual and Procedural Background

¶2 "On review of an Industrial Commission award, we must view the evidence in the light most favorable to sustaining the Industrial Commission's findings and award." *Roberts v. Indus. Comm'n*, 162 Ariz. 108, 110, 781 P.2d 586, 588 (1989). Gloria filed a workers' compensation claim in April 2005, alleging his employment as a fiberglass spray gun operator for respondent employer Baja Products "caused [him] to suffer severe neck

[and] shoulder pain diagnosed as repetitive overuse injury." The respondent insurer denied his claim. His subsequent request for a hearing was granted.

¶3 At the hearing, Gloria's treating physician, Dr. Helen Lin, testified Gloria had visited her office several times, beginning on March 7, concerning "pain and stiffness in his neck" and pain that later developed in his shoulders and lower back. She stated Gloria's spinal X-ray showed "mild narrowing at the C-4, 5 level" and "an orthopedic surgeon" had diagnosed Gloria with "some adhesive capsulitis of the left shoulder." She also noted Gloria had complained of "severe eye pain," and she "sent [him] for an optometologic [sic] evaluation" after which he was diagnosed with scleritis.

¶4 Lin testified that Gloria's shoulder pain was "consistent" with his work duties, which included lifting and holding a fiberglass sprayer and resin-filled hose over his head, and that those duties "could have contributed to his adhesive capsulitis and have been a significant factor in his development of this pain." She also opined Gloria could be suffering from an allergic reaction to chemicals in the fiberglass spray or those chemicals may have contributed to "some kind of autoimmune process" that could have caused his symptoms.

¶5 Dr. Roger Grimes, a board-certified orthopedic surgeon, examined Gloria in October 2005. He stated there were no "objective findings to correlate [Gloria's] complaints" of "cervical pain and lumbar pain, right shoulder pain, [and] bilateral hand pain." Grimes testified he "did not see evidence of abnormality" in Gloria's C-4 or C-5 vertebra upon examining the X-ray of his spine. He further testified Gloria had "mild

impingement syndrome" in his left shoulder and admitted it was "possible" Gloria's "left shoulder complaints were due to the work activities," but could not "state it to a probability." Grimes's opinion, "to a reasonable medical probability," was that nothing in Gloria's medical records "would cause [him] to believe that Mr. Gloria sustained an injury of some type when working for Baja Products in March or February of 2005."

¶6 The ALJ found credible Gloria's "generalized pain complaints," but concluded "the credible medical opinion of Dr. Grimes . . . [was] more probably correct than that of Dr. Lin." The ALJ stated Gloria had "not established a causal connection between his complaints and his work duties" and concluded Gloria had failed to "sustain his burden of proof . . . and therefore, he has not sustained an industrial injury." After Gloria's request for review, the ALJ affirmed her decision. This statutory special action followed.

Discussion

¶7 An employee bears the burden of proving an injury is compensable. *Yates v. Indus. Comm'n*, 116 Ariz. 125, 127, 568 P.2d 432, 434 (App. 1977). To do so, the employee must establish he suffered an injury that "arose out of and in the course of his employment," that is, a "causal relationship between the work activity and injury." *O'Donnell v. Indus. Comm'n*, 125 Ariz. 358, 360, 609 P.2d 1058, 1060 (App. 1979); *see also* A.R.S. § 23-1021(A). We defer to an ALJ's factual determinations and will not disturb these findings unless they are unsupported by any reasonable theory of the evidence. *Vance Int'l v. Indus. Comm'n*, 191 Ariz. 98, ¶ 6, 952 P.2d 336, 338 (App. 1998); *Joplin v. Indus.*

Comm'n, 175 Ariz. 524, 526, 858 P.2d 669, 671 (App. 1993). And, when conflicting medical opinions are presented at the hearing, it is the ALJ's duty to resolve those conflicts. *Stainless Specialty Mfg. Co. v. Indus. Comm'n*, 144 Ariz. 12, 19, 695 P.2d 261, 268 (1985). Thus, an award will not be set aside if there is a reasonable basis in the record to support it. *Mustard v. Indus. Comm'n*, 164 Ariz. 320, 321, 792 P.2d 783, 784 (App. 1990).

¶8 Gloria asserts the two experts' opinions are "consistent with regard to certain injuries and can be reconciled and support an award of compensable injury." He notes Grimes did not address the "diagnosis of adhesive capsulitis" in Gloria's left shoulder and testified Gloria "has evidence of mild impingement syndrome" in that shoulder. The mere fact, however, that Grimes and Lin agreed there was an abnormality in Gloria's left shoulder does not mean their opinions are consistent; nothing in the record tells us whether those diagnoses are necessarily related.

¶9 Gloria additionally points out that Grimes admitted it was "possibl[e]" Gloria's "left shoulder complaints were due to the work activities." Grimes, however, specifically declined to "state it to a probability."[1] Moreover, he disagreed with Lin's physician

[1]Gloria argues, relying on *State Compensation Fund v. Industrial Commission*, 24 Ariz. App. 31, 36, 525 P.2d 623, 628 (1975), that Grimes did not have to "'state [his opinion] to a probability.'" Thus, Gloria reasons, Grimes's testimony is not inconsistent with Lin's because he agreed it was possible Gloria's left-shoulder pain was work-related. Although we recognize that "a doctor's opinion does not have to be positive in order to have some value as evidence," *id.*, Gloria's argument ignores Grimes's testimony that it was probable Gloria had not sustained a work-related injury. *See id.* ("'Possibility' may merely express that a likelihood is something less than 50%; 'probability' something more than 50%.").

assistant's diagnosis of "repetitive overuse injury of muscles, tendons, [and] ligaments" and stated he "d[id] not find a correlation between [Gloria's] complaints of pain and his work activities." Grimes also stated, "to a reasonable medical probability," that Gloria had not "sustained an injury of some type when working for Baja Products." The ALJ, as she was required to do, resolved this conflict between Lin's and Grimes's opinions by finding Grimes's more probably correct. *See Stainless Specialty Mfg. Co.*, 144 Ariz. at 19, 695 P.2d at 268.

¶10 Grimes did not address Lin's testimony concerning pain and scleritis in Gloria's eye. Nor did he discuss her testimony that it was "possibl[e]" Gloria might be suffering from a rheumatologic disorder or allergic reaction caused by chemicals in the fiberglass spray "that could contribute to his eye pain, scleritis, [and] some of his aches and pains." Gloria apparently contends that, because Grimes did not dispute that testimony, the ALJ erred by not finding he had sustained some compensable injury. Lin, however, testified only that the scleritis "might or might not be relevant to [Gloria's] aches and pains." She also stated, "[Gloria] doesn't as of yet have a concrete rheumatological diagnosis," and admitted she did not know what chemicals Gloria had been exposed to at work. This qualified testimony did not require the ALJ to find a compensable injury. *See Lamb v. Indus. Comm'n*, 13 Ariz. App. 408, 411, 477 P.2d 282, 285 (1970) ("[W]hen the evidence is such that the causation tends more to the possible rather than the probable then the work[er] has not sustained the burden of proving the case.").

¶11 Gloria also contends the ALJ incorrectly resolved the conflict between Grimes's and Lin's opinions. In finding Grimes's opinion to be "more probably correct" than Lin's, the ALJ noted "Dr. Grimes' opinion is supported by the objective diagnostic studies as well as his additional expertise as a board certified orthopedic physician." *See Cash v. Indus. Comm'n*, 27 Ariz. App. 526, 532, 556 P.2d 827, 833 (1976) ("Many factors enter into the resolution of [a conflict in expert medical testimony]; i.e.[,] consideration of qualifications of the experts in order to determine which one should be given the greater weight."). Gloria reasons Lin "also based her opinion on objective diagnostic studies," and the ALJ "ignored the chronology of the medical exams and the fact that Dr. Lin had been treating Mr. Gloria for his injuries over a period of years." Gloria further asserts Grimes was less credible because he "saw Mr. Gloria only once for a brief visit" and "was hired and paid by the [respondent] insurance carrier only for the purpose of litigation."[2]

¶12 These facts did not require the ALJ to find Grimes's testimony to be less credible or less correct than Lin's. We do not reweigh the evidence. *See Simpson v. Indus. Comm'n*, 189 Ariz. 340, 342, 942 P.2d 1172, 1174 (App. 1997). Moreover, because "[t]he ALJ is the sole judge of witness credibility," we "will not substitute [our] judgment for that of the ALJ." *Glodo v. Indus. Comm'n*, 191 Ariz. 259, 262, 955 P.2d 15, 18 (App. 1997).

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[2]We note, however, that most of Gloria's examinations were not conducted by Lin, but instead by Lin's physician's assistant, Damon Watts. Nor did Lin diagnose Gloria with adhesive capsulitis, but instead deferred to the report of an orthopedic surgeon. Neither Watts nor the orthopedic surgeon testified.

And Grimes's testimony was sufficient to support the ALJ's ultimate conclusion that Gloria's symptoms "are not the result of a specific or gradual industrial injury." *See Mustard*, 164 Ariz. at 321, 792 P.2d at 784.

¶13 Gloria further contends, relying on *Farish v. Industrial Commission*, 167 Ariz. 288, 806 P.2d 877 (App. 1990), that, because Gloria "[was] injured on the job and there is no medical evidence of a cause other than employment, it is presumed that the injury arose out of the employment and the burden shifts to the employer to prove otherwise." This court stated in *Farish*:

> [W]hen an employee is injured during the course and scope of his or her employment and the cause of the injury is unknown—neither distinctly employment nor distinctly personal—it is presumed to arise out of the employment and the burden is on the employer to prove a cause independent of the employment.

167 Ariz. at 290, 806 P.2d at 879. In that case, the parties stipulated that the employee tore the medial meniscus of his knee while walking at work.[3] *Id.* at 289, 806 P.2d at 878. Thus, it was undisputed that the employee was injured in the course of his employment; the issue was whether the injury arose out of his employment. *Id.* ("'Arising out of' refers to the origin or cause of the injury, whereas 'in the course of' refers to the time, place, and

[3]Nor was it disputed in the cases Gloria cites in his reply brief that the employee's injury occurred at a specific time and place. *See Circle K Store No. 1131 v. Indus. Comm'n*, 165 Ariz. 91, 92, 796 P.2d 893, 894 (1990) (fall near dumpster in store parking lot); *Bennett v. Indus. Comm'n*, 163 Ariz. 534, 535, 789 P.2d 401, 402 (App. 1990) (accidental gunshot wound occurred at place of employment).

circumstances under which the injury occurred."). In contrast, Gloria contends his injury occurred gradually, and the parties do not agree it occurred during his employment. The mere fact that an employee suffers symptoms at work does not mean the injury occurred in the course of employment. *See, e.g., Ware v. Indus. Comm'n*, 92 Ariz. 188, 190, 375 P.2d 384, 385 (1962) ("An employee does not make out a case for compensation by merely showing that he suffered an unexpected internal failure while on the job or that a functional failure was coincidental with his work."). Thus, the presumption described in *Farish* does not apply.

¶14 Lastly, Gloria argues Baja Products failed to properly "advise [him] that he should file a Worker[s'] Compensation Claim" and "refer [him] for medical evaluation, diagnosis, treatment and documentation of his condition."[4] Beyond suggesting Baja Products "must not benefit from such conduct," however, Gloria does not identify, through argument or authority, how this fact, if true, alters his obligation to prove his injury is compensable. *See* Ariz. R. Civ. App. P. 13(a)(6), 17B A.R.S. (appellant's brief must contain argument with citations to authority); Ariz. R. P. Spec. Actions 10(k), 17B A.R.S. (Arizona Rules of Civil Appellate Procedure apply to special action review of industrial commission

[4]In his reply brief, Gloria states Baja Products had a "statutory duty" to give him information about its insurance and to refer him for treatment. He apparently refers to A.R.S. § 23-908(H), which requires an employer to "provide the employee with the name and address of the employer's insurance carrier, the policy number and the expiration date" "upon notice . . . of an accident resulting in an injury to an employee." Nothing in that statute relieves an employee of the burden of proving a claim is compensable in the event an employer violates the statutory requirements.

awards); *In re $26,980.00 U.S. Currency*, 199 Ariz. 291, ¶ 28, 18 P.3d 85, 93 (App. 2000) ("[Appellee's] bald assertion is offered without elaboration or citation to any . . . legal authority. We will not consider it."). Moreover, we find nothing in the record suggesting Gloria made this argument to the ALJ. Accordingly, we do not address it further. *See Stephens v. Indus. Comm'n*, 114 Ariz. 92, 94, 559 P.2d 212, 214 (App. 1977) ("This court will not consider on review an issue not raised before the Industrial Commission where the petitioner has had an opportunity to do so.").

¶15 We affirm the award.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge